JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL NUMBER 107 OF 2007

BETWEEN:

RAPHAEL BWAILA ……..……APPLICANT

- AND -

LE MERIDIEN HOTELS

CORAM: THE HONOURABLE JUSTICE E. B. TWEA
P. Saukila, of the Counsel for the applicant
C. Masanje, of the Counsel for the respondent
Mrs Phombeya – Official Interpreter

J U D G M E N T

Twea, J

This is an appeal from the Industrial Relations Court.

The appellant, who was the complainant in the lower court was employed by the defendant, a local hotel chain. He was a chef at the defendants Mount Soche Hotel.

It is on record that on the day in issue, the appellant was on a night shift and went off duty at about 6:00 a.m. He left the Hotel premises through the staff entrance main gate.

At about the same time one Mr Mauwa, a lift service technician, came on duty and used the guest entrance. He had an empty bag when he got into the

lift. After a while he was seen disembarking from the lift. The empty bag was now full. This attracted the guard's attention. They stopped and questioned him and searched the bag. They found 28 packets of sausages and two packets of margarine. He was taken to police.

It was in the evidence of the defendant that Police informed them that Mr Mauwa, had revealed that he had been sent by the appellant to collect the packets of sausages and margarine from Michiru Restaurant floor. The defendant caused inquiries and audit stocks for that day. They discovered that there were shortages.

The appellant was summoned to a disciplinary hearing. He denied any involvement in the scheme to steal stocks from the defendants. He asserted that he was not caught red – handed. He was asked to explain the shortages but he failed to convince the disciplinary committee.

It was explained that the stocks were under the custody and control of the appellant. He is the only one who would sanction removal of stocks from the cold room and kitchen freezers. In his absence the keys were kept by the duty manager. However, the duty manager could not move stocks or go into the cold room without the knowledge or sanction of the appellant.

The disciplinary committee therefore disbelieved him. In the circumstances, that Mr Mauwa came into the Hotel to collect the stolen stock at the time the appellant was knocking off and had the opportunity to move stocks during the night, it decided to dismiss him for dishonesty.

The lower court found that misconduct based on dishonesty was a valid ground for dismissal. The appellant having been called and heard, it found that the dismissal was not unfair. The appellant now appeal.

There are five grounds of appeal. The appellant alleges that the court decision was based on hearsay, that the disciplinary proceedings were un procedural because the technician was not called to be cross – examined, that the committee sought him to disprove the theft thereby reversing the onus to prove and lastly that the court did not properly assess the balance of probabilities when coming to its decision.

I bear in mind that under Section 65(2) of the Labour Relations Act, appeals lie to this court on points of law or jurisdiction only. I have examined the

grounds of appeal and my view is that the appellant misled himself on matters of law. I will therefore allow the appeal so that the issues are cleared.

To begin with, procedure and evidence in the Industrial Relations Court is governed by Section 71 of the Labour Relations Act. This section stipulates that the rules should have regard to the need for informality, economy and dispatch in the proceedings. More particular subsection 2 stipulates that the court shall not be bound by the rules of evidence in civil proceedings. Further, the Industrial Relations Court (Proceedings) Rules, 1999, provide in rule 13, for pre hearing conference. The pre – hearing conference settles, among other things, agreed or admitted facts and securing of witnesses. In the present case there was an extensive pre – hearing conference before the Registrar. There was no dispute in respect of the discovery of the stolen stocks, the arrest of Mr Mauwa and that he mentioned the appellant. Further there was no dispute that at the time of the disciplinary hearing, Mr Mauwa was in custody and that since he was a contract worker, he was not amenable to the internal procedures of the defendant. Lastly, the appellant did not request the attendance of Mr Mauwa or any other person at the trial.

It is my finding therefore that the court did not err when it admitted the parties evidence in respect of Mr Mauwa. Moreover, over and above what Mr Mauwa did and told the police, the defendants caused an audit and investigations. The findings were not disputed by the appellant. He was requested to answer for the shortage and the findings. He did not. He only alleged that since he was not caught red – handed. Therefor that he did not steal.

In this court the appellant raised several hypotheses against Mr Mauwa. He did not lead any evidence that would justify that. They, therefore remain as allegations that came as an afterthought. The defendant established that stocks missed, were found with Mr Mauwa, and that the appellant and Mr Mauwa were departing and arriving almost simultaneously. The appellant did not dispute this nor explain how the stocks missed on his shift. It was for him to give a reasonable explanation. He did not. He cannot now complain that the onus of proof was reversed.

Lastly, I have considered that the lower court decision was on whether or not the dismissal was unfair. The court considered that the defendant had complied with the provisions of Section 57 of the Employment Act. The

appellant had been afforded an opportunity to be heard. He was heard by the disciplinary committee. It found him wanting. He was given reasons for his dismissal. There was no irregularity with the procedure or composition of the disciplinary committee, that would justify the interference of the court. What has to be borne in mind is that at that point in time, the confidence between the parties had been lost.

The State went ahead and prosecuted the appellant. The fact that he was later acquitted does not, of itself, make the disciplinary proceedings and decision bad at law. The lower court therefore properly assessed the case before coming to its decision.

It is my judgment therefore that this appeal must fail in its entirety with costs.

Pronounced in Chambers this 13th day of February, 2008 at Blantyre.

E. B. Twea
JUDGE